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CASE NO. 97-63

In the Supreme Court of the United States

October Term, 1996

CREATIVE STRATEGY FUND I, and
CREATIVE STRATEGY, INC.,
Petitioners,

vs.

PRUDENTIAL SECURITIES, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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RULE 14.1(b) STATEMENT

Petitioners do not fully identify the parties below. Petitioners are here seeking review of a decision of the United States Court of Appeals for the Eleventh Circuit where they appeared as appellants. They are Creative Strategy Fund I, a Pennsylvania limited partnership, and its general partner, Creative Strategy, Inc., a Delaware corporation, collectively referred to as the "Fund." William S. Scott, Esquire, is the sole limited partner of the partnership, and he is the sole stockholder of the corporate general partner. Mr. Scott is also counsel of record for petitioners in this Court, and was such counsel in all prior proceedings.

Respondent is Prudential Securities, Inc. ("Prudential"), one of two appellees named by the Fund in the Eleventh Circuit proceedings. The other party named as an appellee by the Fund below was Frank S. Pusateri, an individual. He never appeared below because (a) the pleading that named him was stricken by the district court, and (b) he was never served. Prudential is therefore the only respondent here.

RULE 29.6 STATEMENT

Petitioners' corporate disclosure statement is correct as to petitioners but incomplete as to respondent. There are no non-wholly owned subsidiaries of Prudential Securities, Inc. It is wholly owned by its parent, The Prudential Insurance Company of America.

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners, Creative Strategy Fund I and Creative Strategy, Inc. (collectively referred to herein as the "Fund"), seek this Court's certiorari review of the decision of the United States Court of Appeals for the Eleventh Circuit, rendered without opinion, affirming the judgment of the United States District Court for the Southern District of Florida in favor of Prudential Securities, Inc. ("Prudential"). The judgment of the district court enforced an arbitration award made in a reparations claim filed by the Fund under § 14 of the Commodity Exchange Act, 7 U.S.C. § 1, *et. seq.* ("CEA"). The original reparations award

had been made in favor of Prudential by an administrative law judge acting within the Commodity Futures Trading Commission ("CFTC"), which decision was later affirmed by the full Commission in an administrative appeal.

The Fund has failed to establish, as required by Rule 10 of the Rules of this Court, the existence of conflict between the decision of the Eleventh Circuit and any decision of this Court or any other court of appeals. This respondent therefore submits this brief in opposition to the instant petition for writ of certiorari and suggests that this case does not warrant certiorari review by this Court.

STATEMENT OF THE CASE[1]

A. Introduction

The Fund is a commodities trader, and Prudential is, *inter alia*, a commodities broker. The Fund lost money in accounts it maintained at Prudential's Palm Beach County, Florida, office when trading in certain commodities futures turned sour. Prudential covered losses sustained by the Fund in one of its accounts by transferring money from another. A deficiency remained; Prudential sought to recover the deficiency balance from the Fund by resorting to arbitration proceedings before the National Futures Association ("NFA").[2]

Unhappy with Prudential's attempt to obtain arbitration of the parties' differences before the NFA, the

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[1] Petitioners' statement of the case is incomplete, argumentative and conclusory. Prudential therefore restates the case and the facts.

[2] The typical reparations drama which unfolded here is described succinctly in *Commodity Futures Trading Comm'n. v. Schor*, 478 U.S. 833, 843, 106 S. Ct. 3245, 3252-53 (1986), which remains the single most comprehensive authority on the workings of the statutory mechanism involved here. The mechanism establishes an inexpensive forum for adjudicating customer complaints against futures industry professionals.

Fund elected to have its claims adjudicated before the CFTC's Reparations Division. The CFTC is an administrative agency of the United States government. The Fund lost when the agency's administrative law judge ("ALJ") ruled in favor of Prudential, awarding it $101,087.54. The Fund then took an appeal of the ALJ's decision to the full Commission, which affirmed, concluding the administrative process for both trial and appeal.

Judicial review of the full Commission's appellate findings was available to the Fund, but only in the United States Circuit Court of Appeals for the Eleventh Circuit. The Fund filed a notice of appeal to that court, but then elected not to pursue that avenue of further review because of the statutory bond-posting requirement. That prior appeal to the Eleventh Circuit was therefore dismissed.

Prudential then sued in district court to confirm and enforce its arbitration award. The Fund challenged the bona fides of the arbitration process, attempting to establish fraud and bias in the prior proceedings. The district court agreed with Prudential that this matter had already been litigated to finality, and confirmed the CFTC award. Final Judgment was entered for the amount of the award, plus attorneys' fees and costs. The Fund appealed the district court's decision to the Eleventh Circuit (i.e., the Fund's second appeal to that court). It affirmed without opinion, and the instant Petition for Writ of Certiorari followed.

B. Administrative Proceedings

In late 1992, the Fund lodged its complaint against Prudential and others in a reparations proceeding before

the CFTC.[3] The action arose from a reparations claim filed pursuant to § 14 of the CEA. The Fund was represented in those reparations proceedings by its creator and sole limited partner, William Sumner Scott, Esquire. In addition to being a member of The Florida Bar, Mr. Scott is a professional commodities speculator registered with the CFTC and the NFA as a commodity trading advisor and commodity pool operator. Mr. Scott is moreover the Fund's counsel of record, both here and in all prior proceedings of this dispute.

The Fund complained that Prudential improperly transferred $65,733.34 from one of the Fund's Prudential accounts to another. Prudential denied the Fund's claims and counterclaimed for $101,087.54, arising from the debit balance that the Fund created in the course of its trading at Prudential. The action proceeded to final hearing before the ALJ in December of 1993 at a hearing in Miami, [illegible] Mr. Scott appeared as counsel and sole witness for

On February 23, 1994, the ALJ issued his Initial Decision, App. F. Among his several findings, the ALJ concluded that, "Unfortunately for Scott, there is not a scintilla of merit to his complaint." *Id.*, at 53. The ALJ added, "Prudential has established by a preponderance of the evidence that complainant owes a debit balance of $101,087.53, and that debit balance remains unpaid." *Id.* [illegible]itial Decision vindicated Prudential's actions in [illegible]ng the Fund's account in every respect, including the transfer of monies among the various accounts maintained at Prudential by the Fund, the liquidation of the Fund's positions after it failed to meet a margin call, and the calculation of the debit balance.

[3] The administrative proceedings below, as summarized herein, are set out in the ALJ's Initial Decision, dated February 23, 1994, and the Order of the CFTC, entered February 8, 1995; these decisions are included in the Fund's Appendix as App. F, at 45-54, and App. E, at 39-43, respectively.

Dissatisfied with this result, and pursuing available remedies for appellate review, the Fund perfected an appeal of the Initial Decision to the full, five-member CFTC Commission. The Commission carefully reviewed the trial record and entered its comprehensive decision which corrected one immaterial factual finding made by the ALJ. The Commission entered its Order on February 8, 1995, finding that the ALJ's Initial Decision was ". . . both reasonable and supported by the record as a whole . . ." App. E, at 41-42. In unanimously affirming, the Commission adopted the ALJ's factual findings as its own (with the one immaterial exception noted).

Following entry of the CFTC Order, affirming both the dismissal of the Fund's Complaint against Prudential and the award of damages to Prudential, the Fund attempted to perfect an appeal to the Eleventh Circuit, but without first posting the bond required by federal law.[4] The Commission's general counsel opposed the Fund's attempt to obtain appellate review without posting the proper bond. Those appeal proceedings in the Eleventh Circuit were abandoned and later dismissed.

C. Judicial Proceedings

In March of 1995, the Fund attempted a collateral attack upon the final CFTC decision by filing suit in state court in Palm Beach County, Florida. That challenge was unsuccessful, as was the appeal taken from the adverse state court decision to the District Court of Appeal of Florida, Fourth District. (The Fund does not here seek review of these state court proceedings.)

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[4] Enforcement of a reparations award and appellate review of a CFTC decision are provided for at 7 U.S.C. §§ 18 (d) and (e), respectively. The Fund's later-abandoned appeal to the Eleventh Circuit is described in the district court's Order of October 21, 1995, included in the Fund's Appendix as App. C. The verbatim text of the cited statutory sections is included in that Order, App. C, at 32-33.

In July of 1995, Prudential commenced the action below by filing its Petition to Enforce Arbitration Award in the United States District Court for the Southern District of Florida. The action was filed pursuant to the Commodity Exchange Act, 7 U.S.C. § 18(d), and Rule 12.407 of the Commodity and Securities Exchange Rules Relating to Reparations, 17 C.F.R. § 12.407; it sought final judgment enforcing payment of the unpaid reparations award made by the CFTC.

On October 31, 1995, the district court entered its Order, App. C, at 29-36, in which the court recited the procedural history of the dispute, noted dismissal of the previous appeal to the Eleventh Circuit from the CFTC decision, and held in pertinent part as follows:

> The matters upon which Creative Ltd. and Creative Inc. base their motion to dismiss and motion for temporary restraining order are matters that were already litigated before the CFTC. The proper forum to review the CFTC Reparations order is the United States Eleventh Circuit Court of Appeals. Creative Ltd. and Creative Inc. did not perfect their appeal to the Eleventh Circuit as required pursuant to 7 U.S.C. § 18(e). Having failed to perfect their appeal, Creative Ltd. and Creative Inc. cannot now litigate the same matters before this Court. This Court's jurisdiction over this matter is limited to the terms set forth in 7 U.S.C. § 18(d). The terms of § 18(d) clearly state that the CFTC Reparations Order is final and conclusive unless an appeal is taken to the United States Court of Appeals pursuant to § 18(e).

App. C, at 34. The district court noted that it was not simply denying the Fund's Motion to Dismiss, but was treating the applications filed by both sides as requests fo summary judgment. The court then directed Prudential t

submit a proposed form of final judgment which would grant the relief it sought. At that point, but for settling the terms of the final order, it appeared that all litigation had come to an end.

After the district court's October 31, 1995, Order, summarily adjudicating the dispute and directing Prudential to submit a proposed form of final judgment, the Fund filed its purported Answer, Affirmative Defenses, Crossclaim and Third-Party Complaint. In addition to the Answer and Affirmative Defenses, reiterating matters described in the Fund's prior filings, the Fund attempted to assert a Third-Party Complaint and Crossclaim against an individual named Frank S. Pusateri (who was later named as an appellee in the Fund's second appeal to the Eleventh Circuit).

On March 11, 1996, the district court entered two Orders. The first granted Prudential's request that the Fund's Answer, Affirmative Defenses, Crossclaim and Third-party Complaint be stricken from the record. App. B, at 27-28. The second was a Final Judgment in favor of Prudential and against the Fund for the amount of the arbitration award, plus attorneys' fees and costs, for a total money judgment of $111,639.78. App. A, at 25-26.

The Fund appealed the district court's decision to the Eleventh Circuit, which affirmed without opinion by its Judgment entered January 21, 1997. App. H, at 57-58. The Fund's rehearing application was denied April 8, 1997. App. G, at 55-56. This Petition followed.

REASONS FOR DENYING THE PETITION

1. This Petition raises no important question of federal law that has not been, but should be, settled by this Court, nor does it

establish that the United States Court of Appeals for the Eleventh Circuit has rendered a decision in conflict with a decision of another United States court of appeals on the same important matter.

The instant Petition should be denied because it lacks any "compelling reasons" for granting it, as required by Rule 10 of this Court. The immediate object of review sought by the Fund is a judgment of the Eleventh Circuit affirming, without opinion, a decision of a district court. Since there was no opinion, it is not simply that conflict has not been shown, but that a showing of conflict is impossible. There is no "important question" raised by or appearing in the decision under review, because no reasons were given for affirming. While the language of the Court's Rules 10(a) and (c) is neither controlling nor fully measuring of the Court's discretion under Rule 10, the illustrations provided by the Rule demonstrate beyond question that a decision from a court of appeals, which does no more than affirm a district court decision, does not rise to the level of magnitude necessary for this Court to exercise its jurisdictional discretion.

This Court has many times defined the narrow parameters of its certiorari jurisdiction. In *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75 S. Ct. 614 (1955), the Court observed as follows, regarding its then-current rule for granting certiorari review:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . "Special and important

> reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

349 U.S. at 74, 75 S. Ct. at 616. Similarly, in *National Labor Relations Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 71 S. Ct. 453 (1951) , the Court held:

> Certiorari is granted only "in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals."
> . . .
>
> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should "adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." . . .

340 U.S. at 502-503, 71 S.Ct. at 456.

More recently, the Court held in *Braxton v. United States*, 500 U.S. 344, 111 S. Ct. 1854 (1991), that the principal purpose for which the Court permits invocation of its certiorari jurisdiction is to resolve conflicts among circuit courts of appeals and state courts concerning the meaning of provisions of federal law. And, in *Ticor Title Insurance Co. v. Brown*, 511 U.S. 117, 114 S. Ct. 1359 (1994), the Court held:

> Even if the constitutional question presented is hypothetical as to everyone else, it would seem to be of great practical importance to these litigants. But that is ordinarily not sufficient reason for our granting certiorari — even when unnecessary constitutional pronouncements are not in the picture.

114 S. Ct. at 1362. This case poses issues presumably of "great practical importance" to the Fund, but no conflict is presented and there is no Rule 10 reason shown why discretionary jurisdiction should be exercised in this case.

2. This Petition seeks review of matters now barred by the doctrine of *res judicata*.

The Fund complains of irregularity in the decision rendered by the CFTC when it failed to conduct an adequate or proper review of the ALJ's Initial Decision. The Fund suggests or implies the existence of some rule that a reviewing body must remand a case to the fact-finder for further proceedings where the reviewing body takes issue — no matter how slightly — with factual determinations made below. The Fund argues that, because the CFTC refused to remand this case to the ALJ after it took issue with a minor point in his fact-finding, the CFTC Order is not enforceable as a matter of law.

There is neither rationale nor authority offered or cited in support of the assertion of this novel "rule." Since

the Fund has not otherwise articulated or identified the rule to which it refers, and since Prudential is unable to find anywhere a rule requiring administrative agency appellate remand under these facts, no further response appears necessary.

There is however *another* rule which should end this inquiry. This Court has previously held that an administrative decision will be given *res judicata* effect when,

> . . . an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate. . . .

United States v. Utah Construction & Mining Co., 384 U.S. 394, 86 S. Ct. 1545 (1966). *See also, Pantex Towing Corp. v. Glidewell*, 763 F.2d 1241 (11th Cir. 1985), and *City of Pompano Beach v. F.A.A.*, 774 F.2d 1529 (11th Cir. 1985). The administrative decision approved by this Court in *Utah Construction, supra*, was the result of a full adversary proceeding with testimony, cross-examination, exhibits, briefs, and argument. *City of Pompano Beach. Id.*, 774 F.2d at 1538-39, n.10.

There is still another "rule" that the decision of an appellate court at an earlier stage of the same proceeding represents the law of the case. *Gaines v. Dougherty County Bd. of Educ.*, 775 F.2d 1565 (11th Cir. 1985). In view of the rule expressed in *City of Pompano Beach, supra*, there would appear to be no reason why the decision in *Gaines* would not apply with equal force to an earlier decision of an appellate body, convened as a part of administrative agency proceedings. In *White v. Murtha*, 377 F.2d 428, 431 (5th Cir. 1967), the court observed,

> [t]he "law of the case" rule is based on the salutary and sound public policy that litigation

> should come to an end. It is predicated on the premise that "there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members," and that it would be impossible for an appellate court "to perform its duties satisfactorily and efficiently" and expeditiously "if a question, once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal" thereof.

Id., as quoted in *Gaines, supra*, 775 F.2d at 1568. The combined effect of the holdings of *Gaines, White* and *City of Pompano Beach* is that the Eleventh Circuit and the district court were required to accord to the CFTC's decision the same dignity and finality that would be accorded the judgment of another district court.

By *res judicata* and law of the case, and because it is the same dispute involving the same parties, this matter reached finality and the book was closed when the CFTC Order became final without modification by a higher tribunal. Whatever may be the Fund's disagreement with the process used by the CFTC, the door to further litigation of that dispute was closed when appellate review of those proceedings was abandoned.

3. Removing the CFTC order from those which may be cited as agency precedent is neither wrongful nor constitutionally significant.

In the first and third questions presented for review, the Fund chafes at the CFTC affirming but not remanding the ALJ's decision after finding that it contained an immaterial error. Review by this Court is warranted,

argues the Fund, because grave matters of constitutional magnitude are implicated. Key elements of this common theme appear throughout the Petition.

The Fund first focuses the issue as follows:

> The Commission corrected these errors by withdrawal of the decision from those which may be considered agency precedent. Although the Commission may withdraw agency decisions which are consistent with other findings and superfluous, *it is an abuse of process for the Commission Order to attempt to correct defects by withdrawal of its application to others similarly situated and, thereafter, for the lower courts to grant this defective Order full right of enforcement under the Act.*

Petition ("Pet."), at 10 (emphasis supplied). Who found an abuse of process is not stated; this not-otherwise attributed chasm leap assumption can only be the Fund's. Continuing, the Fund urges,

> . . . [T]he Commission was obligated by the Act to either conduct independent fact finding or, pursuant to the ruling in *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378 (11th Cir. 1988), to remand the case to the administrative law judge, for a determination of the effect of the finding of two separate accounts and the deletion of the full set of documents for Account B on the Initial Decision. *Petitioner requests this Court to now correct this mistake of law by denial of enforcement of the Commission Order.*

Id., at 12 (emphasis supplied). The Fund is here urging that this Court leapfrog the circuit and district court decisions below, ignore the original appeal's dismissal, and raise to constitutional magnitude the CFTC's decision to

affirm without remand. The argument is fervent, but its foundation in Rule 10 is non-existent.

Again, there is neither rationale offered nor authority cited for the interesting "rule" advanced in this argument, and the decision in *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378 (11th Cir. 1988), addresses neither side of the issue. (*Bonar*'s significance is its holding that arbitrators are capable of detecting and dealing with fraud.) Why or how these circumstances create a constitutional issue crying out to be settled now by this Court is left undeveloped. It appears once again that the Fund could find no authority for its novel premise, and neither can Prudential.[5]

4. It is now too late to challenge the double-bond requirement.

The Fund argues that the double-bond requirement of the CEA is unfair and unreasonable because it fails to deal with the circumstance encountered here, where the alleged victim of the wrongs complained of — a commodities trader formed as a limited partnership to take financial risks with its venture capital — had the further misfortune of having put *all* of its capital into the investment vehicle that went sour. As a result of having placed every cent at risk and having then lost, this speculator had no money left to hire outside counsel or pay the double-bond required to perfect its appeal from the CFTC Order under 7 U.S.C. § 18(e). While the argument may generate some modicum of sympathy, there is no conflict issue presented, nor is there disclosed any legal

[5] As the Fund appears to acknowledge, Pet. at 10 (above-quoted), courts and agencies frequently make decisions that are withheld from the body of *stare decisis* where it is determined that nothing is added to that body by the case at hand. Why it is wrong, let alone unconstitutional, for no-one but the Fund to be bound by the CFTC decision here is another argument left undeveloped.

foundation for a challenge of constitutional proportions to the requirement that a third legal proceeding — after the ALJ trial and the CFTC appeal — be conditioned upon an appeal bond of twice the amount the claimant has twice been found to be due.

On closer analysis, it is apparent that the Fund has nothing of which to complain, and that its authorities are inapposite. It argues the rights of indigents, Pet. at 19, as if it were an indigent individual caught up in some deprivation of personal liberty callously sanctioned by the lower court proceedings. It tries unsuccessfully to invoke sympathetic images of "[t]he poor," Pet. at 17, overlooking the marketplace reality that the "the poor" generally do not trade in commodities futures, and no person or business entity — rich or poor — is required to engage in this form of speculation.[6] By urging this approach to the facts of this case, the Fund trifles with the constitution and this Court's role as its ultimate protector.[7] Furthermore, the Fund's reliance upon *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir. 1976), is misplaced, where that case considered totally different facts arising under the Perishable Agricultural Commodities Act of 1930 — a legislative scheme having nothing whatever to do with the instant dispute.

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[6] *Myron v. Martin*, 670 F.2d 49 (5th Cir. 1982), found no equal protection violation in the CEA's double-bond requirement. The Fund strongly disagrees, with *Myron*, Pet. at 17, but fails to identify some other judicial decision which also disagrees with *Myron*. The strong disagreement of a certiorari petitioner does not establish warrant for certiorari jurisdiction in this Court under Rule 10.

[7] The Fund argues, "There can be no equal justice when the right to *file an appeal* depends on one's ability to pay [emphasis supplied]," citing to Supreme Court of Florida Chief Justice Barkett's concurring opinion in *Psychiatric Associates v. Siegel*, 610 So. 2d 419 (Fla. 1992), where a statute that required the posting of a substantial bond before suit could be filed was struck down. What Justice Barkett said in her concurring opinion was, "There can be no equal justice when the right to *file suit* depends on one's ability to pay [emphasis supplied]," 610 So. 2d at 426.

Moreover, the time to complain about the CEA and its double-bond requirement was when this matter first went to the Eleventh Circuit. That court, in the first appeal, was fully capable of appraising the argument now urged here. In *Rosenthal & Co. v. Bagley*, 581 F.2d 1258 (7th Cir. 1978), the court held:

> The District Court denied preliminary injunctive relief and, on the defendants' motion, dismissed the action, holding that, because the plaintiff could present its claim of unconstitutionality to the court of appeals in a direct review of the administrative proceeding under 7 U.S.C. § 18(g), declaratory or *injunctive relief interrupting the administrative proceedings was unavailable*. We agree, and affirm the judgment.

Id., at 1259 (emphasis supplied). If there was a constitutional issue, the time to have urged it was through a CEA appeal to the Eleventh Circuit from the reviewing decision of the CFTC. Since that avenue of appellate relief was not pursued and the earlier appeal was dismissed, any remedy has now been lost.

Lastly, nothing in the statutory scheme suggests even for a moment that Congress intended that the Fund should have the option of foregoing its earlier appeal — thereby neatly avoiding the bond requirement — and then later raising the same issues in these proceedings, where the Fund found its way a second time to the Eleventh Circuit without having to post any bond at all. That court's subject matter jurisdiction in the former dispute was lost when the prior appeal was dismissed. Nothing the Fund has presented here suggests that the Eleventh Circuit, in this action, could have properly reopened the prior appeal.

5. This Petition impermissibly asks the Court to exercise discretionary jurisdiction based upon

(a) factual findings claimed to be erroneous, and (b) arguments not fairly included in the questions presented.

By this Court's Rule 10, the Court has specifically advised that a petition for a writ of certiorari is "rarely granted" when the asserted error consists of "erroneous factual findings" or the misapplication of a properly stated rule of law. In this case, the Fund is absolutely convinced that the ALJ misunderstood or misinterpreted the evidence being presented at the original administrative hearing, when he supposedly undertook to carefully consider the credibility of witnesses and the evidence adduced. The Fund — through Mr. Scott, as client, counsel and sole witness — strongly disagreed with the factual determinations made by the ALJ.

However, a complaint regarding these allegedly flawed factual findings was then taken to the full Commission, which reviewed the record created by the ALJ and affirmed. For reasons discussed above, an appeal to the Eleventh Circuit followed but was later abandoned and dismissed. Still unhappy with the contrary view of the facts being taken by a growing number of judicial officers, the Fund continued to press its differing view of the facts in the district court and in the Fund's second trip to the Eleventh Circuit. In its Petition here, the Fund continues to argue erroneous factual determinations.

Under the language of Rule 10, and the above-quoted language from *National Labor Relations Board v. Pittsburgh S.S. Co., supra*, 340 U.S. at 502-03, 71 S.Ct. at 456, the Fund's express reliance upon disputed factual matters not only fails to establish warrant for certiorari review, it affirmatively demonstrates that the instant Petition should be denied. With this dispute now having been lodged in seven different agency or court proceedings — not including two Florida state court actions — the

concept of being entitled to one's "day in court" has all but lost its meaning. Since the order here for review affirmed without opinion and could not have involved original fact finding, there can be no viable establishment of jurisdiction here based upon the ostensibly flawed finding of facts in some prior proceeding.

Lastly, the Fund presents a brief but less than concise argument that, "If this were an arbitration proceeding, . . . [a] scan of the record would be required." Pet., at 14. Authority for this proposition is cited as *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920 (1995). The cited case only considered how a district court should review an arbitrator's decision that the parties agreed to arbitrate a dispute, and how a court of appeals should review a district court's decision confirming, or refusing to vacate, an arbitration award. *First Options* neither addresses nor resolves any issue here, including whether the record needs to be scanned. More significantly, from the procedural perspective of the Court's rules, neither the scanning question nor the holding in *First Options* appear to be fairly encompassed by any of the questions presented here.[8]

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[8] The Fund's first and third questions presented for review quarrel with the CFTC having affirmed the ALJ without remanding a minor factual issue. The second and fourth questions deal with the double-bond requirement and whether Prudential may now even argue the point. Nowhere has the Fund presented a certiorari issue dealing with CFTC jurisdiction to adjudicate state law claims, and the decision here for review is of course silent.

Nonetheless, the argument relying upon *Blunt, Ellis & Loewi, Inc. v. Hlavinka*, 896 F.2d 240 (7th Cir. 1990), is without merit. Later developments in the cited case led to *Hlavinka v. Blunt, Ellis & Loewi, Inc.*, 497 N.W.2d 756 (Wis. 1st DCA 1993), where the Wisconsin appellate court correctly explained and resolved the seeming anomaly created by the earlier federal court decision. Where the CFTC may lack jurisdiction to hear certain state law claims, the making of such a later claim will still be barred by collateral estoppel where the *facts* necessary to determine the claim have all been previously litigated before the CFTC.

CONCLUSION

The Petition for a Writ of Certiorari should be denied for failing to demonstrate any important reason why this Court should exercise its jurisdictional discretion.

Respectfully submitted,

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